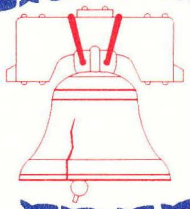
THE DECLINE OF PROPERTY RIGHTS AND FREEDOM IN AMERICA



THE DESTRUCTION OF OUR FOUNDER'S INTENT FOR THE U.S. CONSTITUTION

by
Michael S. Coffman, Ph.D.
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Michael S. Coffman, Ph.D.
Environmental Perspectives Incorporated
1229 Broadway Suite 313
Bangor, Maine 04401
(207) 945-9878
Order Number (800) 799-9878

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Ruby Ridge, Waco, right wing militias, property rights, wise use, conservatives and even Christian "fundamentalists" — All of these engender images of activists, civil unrest, and people frustrated with the federal government in one form or another. The Clinton Administration and media often characterize these events or movements as involving right wing extremists that hate their government and foment tragedies like the bombing of the federal building in Oklahoma City. Nothing could be further from the truth.

While many Americans may not agree with the beliefs of some of these groups and people, why are so many mainstream Americans creating and joining groups affiliated with the property rights, wise use and conservative movements? And why do so many more people feel that somehow they are disenfranchised and no longer have control of their own destiny? Most important why do recent polls show that 52 percent of us now fear our federal government? There is a growing awareness that something is terribly wrong in America, but most Americans are unsure of what or why.

To the majority in suburban America what is happening in rural, natural resource based communities is at best baffling. Many suburbanites view the complaints by farmers, ranchers, and other rural citizens that depend on their land for a living as nothing more than a bunch of backwoods hicks fighting any zoning or regulations they don't like. After all, suburbanites are a people who are used to living with strong self-imposed zoning ordinances. They understand the necessity of zoning to protect their property values and quality of life and don't understand why their rural cousins are so upset. Little sympathy is extended to landowners who lose value and use of their property in order to protect wetlands, bald eagles and aesthetics. These same suburbanites, on the other hand, are fed up with unfunded mandates and an avalanche of expensive federal regulations. Both groups of citizens increasingly complain that federal mandates and regulations are wasteful, substantively increase their taxes, reduce their freedoms, and are often ludicrous in their application. All this while doing little to protect the environment or people.

Ironically, the division of Americans into urban, suburban and rural classes has little to do with the problem. Contrary to common perception, *all* Americans want to protect the environment. So why are these Americans so outraged? And why has that outrage only deepened with the passage of time? Over and over again a growing number of us assert the problem lies not with any need for self-imposed zoning, comprehensive planning or other regulations to protect the environment or workplace, but with a bureaucracy assuming powers that guarantees tyranny of the people it regulates.

There is a growing awareness among Americans that they have become the first unwitting victims of a neo-feudalism that is now spreading like wildfire across America. These Americans are quick to remind us that the Revolutionary War we fought was to throw off the suffocating yoke of British feudal rule of the Colonies. These Americans make the incredible claim that two hundred years later a similar feudal oppression is being imposed — wrapped in the noble cause of protecting the environment, workplace and lives for the benefit of all! If they are correct, it portends enormous consequences for every American regardless of where they live. Instead of "rolling back 25 years of environmental progress" as asserted by President Clinton and other environmental leaders, we are "rolling back 200 years of freedom." We may be choosing between freedom and feudalism.

To properly determine if these accusations have merit we must first understand what is known as "natural law," the nature of feudalism, and the critical importance of property rights in avoiding the tragedy that feudal rule can impose.

CONSTITUTIONAL INTENT OF PROPERTY RIGHTS

The Importance of Natural Law

Approximately four hundred years ago, a philosophy called "enlightenment" began to form in Europe and later spread to the British colonies in America. Enlightenment was a term used to describe a trend of thought which eventually formed the modern principles of democracy. Isaac Newton, Sir William Blackstone, Thomas Locke and Thomas Jefferson were all part of this rational approach to social, political, economic and scientific questions.

The underlying principle of enlightenment was simple. Civilization is governed by certain natural laws. Violating these laws does not break natures's physical laws, but only results in man breaking himself. To protect ourselves from the evil consequences of many of these natural laws, God endowed mankind with certain unalienable natural rights. Sir William Blackstone was repeatedly quoted by our Founding Fathers on this subject:

> "Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.... And, consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. *This will of his Maker is called the law of Nature.* For as God, when he created matter, and endued it with a principle of mobility, established certain rules for perpetual direction of that motion; so, when he created man, and endued with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature.... These are the eternal, immutable laws of good and evil.... This law of nature is...of

course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: *no human laws are of any validity if contrary to this*, and such of them as are valid derive all their force and all of their authority, mediately or immediately, from this original."[1] (Italics original)

"Those rights, then, which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolate. On the contrary, *no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture."*[2] (Italics added)

While these precepts are Christian in derivation, they have been proven correct time and time again throughout history. Thomas Jefferson, in fact, is noted as one of the foremost scholars of cultures, civilizations and forms of government. Jefferson, a deist not a Christian, called these natural laws "the laws of nature and of nature's God" in the Declaration of Independence. For any human legislature to violate these laws is to invite tyranny upon its citizens.

By understanding these natural laws through education, science and technology, man can learn and exercise his own "unalienable rights" as a human being. Only by understanding these laws and applying them correctly can man experience health, life, liberty, possessions and happiness. Conversely, tyranny is only able to rule by ignorance or force. Of these two mechanisms, ignorance is by far the most efficient tool to empower tyranny and place people into bondage.

Americans no longer receive a solid education in these natural laws and their importance in providing the foundation and framework of our Constitution. It should therefore be no surprise that citizens can no longer identify the safe paths through the minefield of these natural laws. Increasing tyranny is the result. ***Ignorance completes its task by allowing the perception that the Constitution is an outdated document rather than a living instrument designed to protect our fundamental freedoms.***

These natural laws are as inviolate as the law of gravity. Just because we cannot "see" gravity doesn't mean we will not plunge to our death if we step off the edge of a 1,000 foot cliff. Likewise, these natural laws can protect or doom our freedoms, economic well-being, and happiness depending on how they are used. Of the many natural laws and rights, property rights surfaces as one of the most important. It was from this perspective that both the Declaration of Independence and the U.S. Constitution was framed.

Our Founder's Fear of Feudalism

As if to emphasize feudal evil, the Declaration of Independence stands in resolute defiance of feudal repression; declaring that its form of tyranny should never again gain a foothold in this nation of freemen endowed with certain unalienable rights:

> ***WE** hold these Truths to be self-evident, that all Men are created equal, that they are **endowed by their Creator with certain unalienable Rights**, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, **deriving their just Powers from the Consent of the Governed**, that whenever any Form of Government becomes destructive of these Ends, **it is the Right of the People to alter or to abolish it**, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.* (Bold added)

It is significant that the phrase "Life, Liberty, and the Pursuit of Happiness" in the Declaration of Independence originally was "Life, Liberty, and Property." Property to the Founders was the foundation of happiness. The phrase was changed only because happiness could also come from a business venture that used an intangible form of property — contracts. Although property was still at the heart of this phrase it was changed to permit it to mean "the right to pursue whatever course of life a person may desire in search of happiness, as long as it does not invade the inherent rights of others."[3] Interestingly, the original phrase including the word property *is* found in the Fifth and Fourteenth Amendments to the U.S. Constitution.

Stripped to its bare essence, James Madison defined this type of tyranny as simply the accumulation of all powers,

> "*The accumulation of all powers* — legislative, executive, and judiciary — in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly *be pronounced the very definition of tyranny.*"[4]

If left to their own desires, most people will "naturally" accumulate power to themselves to the detriment of others. If left unchecked this "natural" human failing inevitably leads to what Thomas Jefferson defined as the feudal/ruler form of government. Our Founding Fathers had first hand knowledge of what they spoke. Feudalism would not end in Europe for another sixty years following the signing of the Declaration of Independence in America. Our Founders bore personal witness to the oppression resulting from a millennium of dark feudalism.

Alexander Hamilton noted that in feudalism[a] common people (serfs) are at the mercy of feudatories (Sovereigns and Lords who have control of the land — the ruling elite), and vassals (intermediaries who carried out the edicts of the ruling feudatories). These elite nobility represented a very small minority who controlled the serfs that made up the vast majority of the population.[5] Their elitist power over the serfs was derived through land control — they alone could dictate who could use the land and how they used it. Without land to grow crops, conduct business or have a home the serfs could not survive. They had to do the bidding of those in authority. Such god-like power inevitably resulted in abuses of any "guaranteed" personal rights. It always created severe oppression.

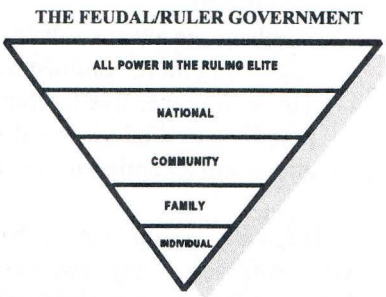

Figure 1. In the generalized Feudal/Ruler form of government, Jefferson and Madison note the majority of the power resides with the ruling elite and is passed through several administrative levels to rule over the people. The people only have those freedoms granted by the elite and administrators. Regardless of their theoretical definitions, communism, fascism, monarchies, and totalitarianism are merely variants of this model. Jefferson and Madison note that tyranny is the inevitable result of this form of government. *(From W. Cleon Skousen.* The Making of America. *National Center for Constitutional Studies, Washington, DC. 1985. Pp 45.)*

Our Founders fully understood that any form of government which has a "top-down" power structure results in this feudal/ruler tyranny.[6] It is no accident that by simply changing the names of the various administrative units used in Hamilton's definition of feudalism, it is possible to identify the applied forms of communism, fascism, imperialism, totalitarianism — even the pure form of federalism. They may differ in form, but not in substance. The "top-down" structure of power and authority is the common denominator. They all have certain characteristics in common:

1. Power is by compulsion, force, conquest, or legislation usurpation.
2. Power is concentrated in the one or the few.
3. The people are treated as "subjects" of the one or few.

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[a]The strictest definition of feudalism is a system of contractual relationships among the members of the upper class in medieval Europe, in which lords made grants of fiefs (usually property) to vassals in return for pledges of military and political service. In contrast, seignorialism (or manorialism, as it is called in Britain) was the system of relationships between lords and their subjects, chiefly peasants or serfs, who were socially as well as politically their inferiors. The incorporation of seignorialism into the definition of feudalism was done by Voltaire, who wanted to illustrate the tyrannical results of feudalism during the French Revolution. Voltaire's use of the term will be used in this paper since we are using the term feudalism in the broader sense of how this top-down structure enslaves the common people.

4. The land is treated as the "realm" of the one or few.
5. The people lose their unalienable rights.
6. Freedom is not considered the answer to anything.
7. Government is by the rule of men rather than the rule of law. (i.e. arbitrary and capricious)
8. The people are structured into social and/or economic classes.
9. The thrust of government is always from the top down, not from the people upward.
10. Problems are always solved by issuing new edicts, creating more bureaus, appointing more administrators.
11. Those in power live in comfort and luxury while the lot of the common people is one of perpetual poverty, excessive taxation, stringent regulations and a continuous existence of misery.[7]

Tragically, every one of these characteristics is evident and increasing across America. Many laws passed and presidential executive orders issued since the 1960s have usurped powers from local jurisdictions and denied citizens certain "unalienable" property rights. Vast bureaucratic empires are being created that increasingly treat citizens as "subjects." Problems are solved by more laws and regulations rather than free market approaches. The application of these loosely defined laws and executive orders have inevitably begun to become arbitrary in their application. We are even seeing the beginning of a two class society.

Constant and increasing tension and strife characterize a society dominated by this form of government. This strife increases until the government strangles itself, falls of its own ineptness, or is overthrown by revolution — just like our Founding Fathers did with England over 200 years ago.

Feudalism and Federalism

It is clear from these natural laws that feudal tyranny can take forms other than that of the Lords, feudatories and vassals that characterized European feudalism. It may surprise many that feudalism and federalism are both rooted in the same Latin root word *foedus* which means a league or compact between states or individuals. In its primary form *foedus* means foul, filthy, horrible or abominable.[8] While feudalism describes centralized and consolidated agreement for land and military control, federalism focuses on agreements for centralized and consolidated political and military control. The net affect is basically the same. Madison noted in Federalist Papers No. 19.3 that one can and will lead to the other.

So fearful were our Founders of the dangers of having a strong federal government and its propensity to assume tyrannical feudal powers that the Articles of Confederation, which preceded the Constitution, gave the federal government no real power. It soon became obvious the confederacy was being pulled

apart by self-interest and the institution of petty regulations designed to promote local prosperity within the individual states. It was recognized that a federal government having some power over the states was essential to maintain unity[9] — albeit one where federal power was severely restricted,

> "The powers delegated by the proposed constitution to the federal government are *few and defined.* Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. The powers reserved to the several states will extend to all objects which ...concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state."[10]

It was clear to the Founders that the powers of the federal government were to be restricted to issues dealing with foreign relations, war and commerce. The purpose of the commerce clause in Article 1, Section 8.3 was to *enhance* commerce with other nations and among the several states. In the case of interstate commerce the focus was on *reducing* regulatory barriers, rather than controlling commerce through a myriad of interlocking and often repressive regulations as is the case today.[11] Those powers dealing with internal matters were specifically given to the states and local governments where they could more directly be controlled by the citizens who would be affected.

Even so, our Founders warned the states and their citizens to be ever vigilant to limit the growth of federal power, lest it inevitably amass for itself the accumulation of all powers. The Ninth and Tenth Amendments to the US Constitution were specifically included to prevent federal expansion of powers, especially into the affairs and lives of the people;

> IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In short, Congress and the federal government have no powers whatsoever other than those clearly spelled out in the U.S. Constitution. Furthermore, if there was ever any doubt whether federal rights exceeded state and local rights, the latter rights will prevail. These rights, warned Patrick Henry, must be jealously guarded lest they be stripped from the people,

> "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but *down-*

right force. Whenever you give up that force, *you are inevitably ruined.*"[12] (Italics added)

The environmental and public interest lobbies have made a mockery of the critically important amendments that reign in federal power. Espousing the noble cause to keep us from destroying the environment and ourselves, environmental and public interest leadership are trusted by most Americans. Their fear generating and oft-times unfounded accusations are rarely challenged. Alexander Hamilton warned that is the time of greatest danger,

> "It is a truth, which the experience of ages has attested, that the *people are always most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion.*"[13] "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will after a time, give way to its dictates.... [T]he *continual effort and alarm attendant on a state of continual danger*, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. ***To be more safe, they at length become willing to run the risk of being less free.***"[14] (Italics and bold added)

To be safe Americans are yielding more and more of our freedoms to an unaccountable and ever expanding federal bureaucracy. Thomas Jefferson was so certain that creeping federal power would inevitably lead to tyranny that he gave future generations a chilling warning,

> "*When all government,* domestic and foreign, in little as in great things, *shall be drawn to Washington as the center of all power*, it will render powerless the checks provided of one government on another and will *become as venal and oppressive as the government from which we separated.*"[15] (Italics added)

These Founders had reason to warn future generations that *any* form of feudalism, be it an aristocratic elite or federalism, would always become progressively more suffocating and cause increasing alienation among those who were under its oppression.[16] It was for this reason Jefferson was committed to creating a "system by which every fiber would be eradicated of ancient or future aristocracy, and a foundation laid for a government truly republican."[17]

In what has often been ascribed as a miracle, Jefferson and Madison convinced the burgeoning neo-aristocracy of their day to give up their special privileges and yield to these truths. As a result, the Constitution was devised to prevent a feudal elite and aristocracy from ever controlling the land and therefore the lives of American citizens again.[18, 19] Perhaps at no other time in the

history of mankind has such self-sacrificing action been taken. As the emerging gentry in America, our Founding Fathers chose to deny their families and their descendants the property, wealth and privilege that came with aristocracy.

Tragically, Jefferson's warning has been brushed aside and a new elite is creating the conditions for tyranny. Just as Jefferson warned, this tyranny is gradually becoming "as venal and oppressive as the government from which we separated." It is more than ironic that it was Alexander Hamilton who planted the seeds of the very tyranny he despised. While serving as Secretary of the Treasury, Hamilton "wanted to interpret the welfare clause [Article I, Section 8.1] as a general grant of power to the Congress to do anything which it felt was for the welfare of anyone or any part of the country."[20] Jefferson and Madison, however, asserted that the "federal government had been granted the authority by the states to do only *twenty* things, and that each of these must be carried out for the GENERAL welfare of the whole nation. They said this meant that the welfare clause was designed as a *restriction* of power, not a grant of power."[21] (Italics added) In other words, what is done for one individual or group, must be done for all.

It is by these timeless standards against which the accusations of disempowered Americans must be weighed. Are these Americans merely being stubborn trouble makers? Or are they following in the footsteps of Thomas Jefferson who became an enemy of the King in 1774 at age 31 by writing, "Single acts of tyranny may be ascribed to the accidental opinion of a day; but a series of oppressions ...pursued unalterably through every change of ministers, too plainly prove a deliberate, systematical plan of reducing us to slavery."[22]

The Inevitability of Tyranny

The fact that corporations are usually structured upon the feudal/ruler model goes a long way in explaining management/labor strife that has historically plagued companies organized in this manner. While it is the unavoidable nature of corporations to be organized with this feudal/ruler structure, knowledge of its consequences can help explain why they can rapidly become corrupt without strong oversight. It is not that the people running these corporations are inherently corrupt or tyrants, the *system* itself leads to corruption and tyranny. Even though corporations must of necessity have a top-down structure, those that have made their organizational structure as flat as possible and focused on team management have often reaped big rewards by minimizing internal strife and maximizing productivity.

It is ironic that while environmental and public interest leaders and others are quick to point out the feudal failings in corporations, they somehow believe the same abuses will not occur with unaccountable bureaucrats having feudal-like powers. They somehow believe government bureaucrats are inherently "good" men and women who selflessly look out for the public good, while corporate leaders are naturally greedy and power hungry. Patrick Henry clearly

defined the fallacy of this type of thinking,

> "Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty! I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt."[23]

Corruption and greed are the inevitable results of an unaccountable feudal/ruler structure whether it is a corporation or a government. Most Americans understand how unaccountability can lead to corruption. Greed and desire for control (power) is a "natural" human failing, and many people who would otherwise not be greedy or power seekers, can succumb to these failings if there is no accountability. Tyranny is the natural by-product of this process and has little to nothing to do with how mean a person is. Yet it is the "natural" result of the feudal/ruler structure as certainly as the law of gravity.

How can one person knowingly inflict harm and abuse on someone else? A study done by Yale research psychologist Dr. Stanley Milgram provides the stunning answer in research he conducted in human behavior,

> "a majority of people would go to great lengths to comply with expert authority, despite the stress induced by the conflict between what they knew was right and what they were asked to do. Many obeyed the experimenter by inflicting great pain, regardless of the victim's agony and pleas for release from the experiment. Those who volunteered for the experiment were not sadists or cruel monsters recruited from the fringes of society. They were ordinary people drawn from the working, managerial, and professional classes."[24]

Milgram and the psychology world were shocked by these results. Milgram concluded that "*...ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process.*"[25] (Italics added) Sociologist Dr. Robert Lee notes that "all of us, in almost any daily social relationship, have the capacity to do cruel things to others if we are put in a hierarchial relationship where we look to authorities or experts for guidance on what to do. What is most troubling are those situations where we comply with authorities without realizing the suffering we have inflicted on others. Yet that is exactly the situation in which we find ourselves *with regard to many environmental problems.*"[26] (Italics added)

Simply stated, bureaucrats can inflict enormous pain on others while sleeping well at night and never seeing themselves as tyrants. It is not that these agents are tyrants as they are often accused,* it is the system. *A feudal/ruler structure will naturally produce tyranny and wreck havoc on the econ-

omic structure of a nation—especially when those in unaccountable authority believe they are doing something good and are directed by a higher authority!

Protection Against Tyranny

Our Founding Fathers clearly understood the tyranny that results with the feudal/ruler system of governance. They framed the Constitution to 1) establish unalienable rights in the Bill of Rights to protect all citizens from feudal/ruler tyranny, 2) give the ultimate power to the people themselves so the bureaucrats are accountable to the people they govern, and 3) divide and redivide government so that it would always have the checks and balances necessary to prevent power from ever consolidating into the hands of a few, unaccountable people.

The need for unalienable property rights is discussed in detail below. Inherent in the second protection, our Founders concluded that freedom could only be guaranteed by a government "of the people," in which all laws were to be created by common consent of the same people *who would be affected by those laws*.[27] In this context lawmaking belongs exclusively in the hands of the legislature or congress, who are accountable to those who elected them,

> "The legislat[ure] cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people.... And when the people have said,' We will submit, and be governed by laws made by such men, and in such forms' nobody else can say other men shall make laws for them; nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them."[28]

Only when would-be rulers and tyrants are accountable to the people will they act in the best interests of those people. If they don't they will be out of a job.

Likewise, when the congress and legislature enact laws, they must be simply written for the common man so that they cannot be misconstrued into something the legislature never intended. Thomas Jefferson asserted that "laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rules of common sense. *Their meaning is not to be sought for in metaphysical subtleties which make anything mean everything or nothing, at pleasure.*"[29] (Italics added) Yet, most environmental and public interest laws enacted during the latter half of the twentieth century are so loosely written they can mean anything. By doing so, congress and many state legislatures have in fact delegated these powers to unaccountable regulators in the executive branch. In turn, these regulators are often sympathetic to, or heavily influenced by, the environmental and public interest groups. Tyranny is the result.

The classic example of this abuse is our numerous and often arbitrary federal wetlands regulations. All federal wetlands regulations are based on Section 404 of the Clean Water Act which was intended by congress to prevent toxic pollution of the "navigable waters of the United States." Yet nowhere does this law mention the word wetlands or imply that the law extends to wetlands. Yet landowners and homeowners are paying heavy penalties and are being sent to prison for allegedly destroying wetlands that are often dozens of miles from the nearest "navigable water" and which never have standing water on the surface.

Finally, the force of law must be applied equally to the governors as well as the governed. Feudal tyranny begins, as Madison notes above, the instant the law makers have the autonomy to create laws for their own pleasure or convenience (called "man's law") and are not accountable to those they govern The federal register now publishes over 70,000 pages of new federal laws and regulations annually. No one can keep up with these ambiguous and oft conflicting mandates. Worse, their very ambiguity allows government agents to apply them arbitrarily and selectively against any citizen they do not like.

Arbitrarily applied laws are not only punitive to those being regulated, but extract an enormous toll on the overall economy of the affected area. The Heritage Foundation reports that *unneeded* regulations are costing this nation between $800 *billion* and $1.6 *trillion* a year. This translates into approximately $8,000 to 16,000 annually for each American family.[30]

Benefits of the People's Law and Private Property

Most Americans think of property as land and perhaps their home. In defining the meaning and intent of property as used in the Constitution, however, James Madison was both broad in inclusion and absolute in protection. "Property," wrote Madison, "in its particular application, means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's *land*, or *merchandise*, or *money*, is called his property. In the latter sense, a man has property in his *opinions* and the *free communication* of them."[31] (Italics added) Hundreds of laws ranging from ownership of land, homes, crop, livestock, and other possessions to copyright protection rests upon this definition.

Note that this concept is so important that Madison treated both land and money as equal examples of property. Indeed, many investors convert money into land as a long-term investment rather than keeping it in a low yield bank account or CD. In this regard land is merely another, albeit, less liquid species of money. ***To devalue land by any percentage through regulation is the same as expropriating a comparable percentage from a bank savings account in***

order to achieve a desired goal — such as paying down the national debt. That type of action would be met with outrage by voters, and those in public office who voted for the action would soon be voted out of office. Yet, somehow it is permissible to exploit landowners by expropriating a portion of the value of their land to provide some altruistic benefit for others. ***It is little wonder that landowners are growing increasingly fearful and outraged at loosely written, ambiguous laws that permit arbitrary regulations that deny them, in essence, their savings and therefore their future.*** The U.S. Congress must view property rights as having the highest priority as it considers any law or reviews any regulatory effects.

Only under true self-governance where every citizen has the right, as limited by the common law principle of harm and nuisance, to own unencumbered property in their respective pursuit of happiness can freedom be a true reality. Self-governance and the sacred right to own property are essential to all the other freedoms guaranteed in the Bill of Rights. Although John Adams sharply disagreed with other founders on the need for an elite ruling class, he nonetheless asserted a fundamental truth,

> "The moment that the idea is admitted into society that property is not as sacred as the Laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. *Property must be sacred or liberty cannot exist.*"[32] (Italics added)

This fundamental truth has been reaffirmed throughout history as another natural right. Early in this century Theodore Roosevelt also noted,

> "In every civilized society, property rights must be carefully safeguarded; ordinarily and in the great majority of cases, human rights and property rights are fundamentally and in the long run, identical."

The foundation for this fundamental natural law is simple. Once citizens can be arbitrarily deprived of political equality, shelter, the ability to freely grow food and obtain water, those citizens will become slaves to those who do control them — or face retribution. Since it is foolish to speak out against someone who can destroy your life, all other freedoms are meaningless. Of what value is the freedom of speech, for instance, if the person or ruling elite whom you would speak against has the power to deny you through confiscation, taxation or regulation the use of your land, business, or dwelling upon which your life depends? Without strong property rights providing the ability of every citizen to "pursue happiness," tyranny will result.

The deep convictions of freedom held by Madison, Jefferson and others originated from a thorough study of history. In his relentless quest to identify the perfect form of government, Jefferson found only one very simple model

that protected the freedom of the people. He called it the *People's Law*. This model rests upon the premise that all power resides with the people whose basic freedoms are protected by unalienable rights. The power to make and implement laws *must* be controlled by the people they effect or tyranny would result. Jefferson was so adamant about this principle that he asserted that power must never be taken from the people,

> "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power."[33]

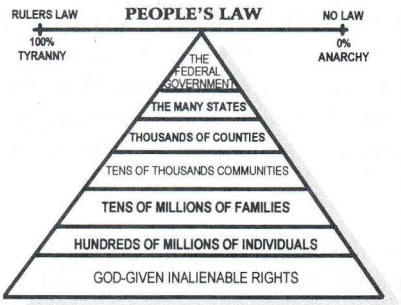

Figure 2. Jefferson found that the People's Law reversed the power structure of the Feudal/Ruler Government. By protecting God-given unalienable rights and placing all the power in the hands of the people themselves, those that administer are always accountable to the people they govern. Jefferson repeatedly asserted that this generalized form of government is the *only* form that guarantees freedom of the people in which a society can flourish. *(Source: W. Cleon Skousen, The Making of America, National Center for Constitutional Studies, Washington, DC. 1985. Pp 46.)*

Similarly, there must be citizen autonomy to provide shelter and other needs, grow food crops, have access to water, and self-governance within the framework of common law and high standards of morality. As noted earlier, ***all other freedoms are rooted in the ability to own and use property as an unalienable right.***

Jefferson found only two societies in all of history that instituted this freedom-based model of government. The first was created by Moses during the Israelite's exodus from Egypt. Israelite self-governance was established within the framework of what is now known as common law based on high moral standards and absolute property rights limited only by the principle of harm and nuisance.[34] The second was by the Anglo-Saxon's, which was almost an exact copy of that laid out by Moses. Freedoms crumbled, tyranny commenced and vibrant socio-economic societies were destroyed when either society drifted from this model.[35]

The Anglo-Saxon form of government lasted until 800-1000 AD when it began to be co-opted by feudalism. The right of self-governance was lost as the people allowed property rights to shift from the citizenry to nobility under feudal rule. The Norman Conquest in 1066 destroyed the last vestiges of freedom in England and the full effects of feudalism degraded the citizenry to the status of serfs totally dependent on the elite aristocracy for their very survival.

It was against the remnants of this very same feudal tyranny that Jefferson

penned the Declaration of Independence. In contrasting feudal law and Anglo Saxon law, Jefferson extolled,

> "Are we not better for what we have hitherto abolished of the feudal system? Has not every restitution of the ancient Saxon laws had happy effect? Is it not better now that we return at once into that happy system of our ancestors, *the wisest and most perfect ever yet devised by the wit of man, as it stood before the eighth century?*"[36] (Italics added)

Although our Founders came from divergent backgrounds and often had sharp differences of opinion, James Madison, Thomas Jefferson, Benjamin Franklin as well as others repeatedly reinforced the fundamental belief that the freedom to own property was a God-given unalienable right upon which *all* other civil rights rested. Jefferson asserted that as long as the common citizen did not have an unalienable right to own and freely use property limited only by common law and morality, freedom could never be a reality. Even though the state must retain the right of eminent domain, it could only be applied with just compensation as provided for in the Fifth Amendment to the U.S. Constitution, "nor shall private property be taken for public use, without just compensation."

So important was the role of private property rights in protecting *all* basic freedoms, that our Founding Fathers of the Constitution included more than twenty provisions that safeguard property rights from the tyranny of the state. After the Constitution was ratified, James Madison reaffirmed that one of the primary purposes of a just government was to protect private property rights,

> "Government is instituted to protect property *of every sort*; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This *being the end of government, that alone is a just government, which impartially secures, to every man, whatever is his own.* That [which] is *not* [a] just government, nor is property secure under it, [is one] where *arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use* of their faculties, and free choice of their occupations, which not only constitutes their property in the general sense of the word; but are the means of acquiring property strictly so called."[37] (Italics added)

Madison included the concept that government could not do indirectly what it could not do directly. In his view,

> "A government...which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly even for public use* without indemnification to the owner; and yet *directly* violates

> the property..., nay more, which *indirectly* violates their property in their actual possessions, in *the labor that acquires them their daily subsistence*, and in the *hallowed remnant of time which ought to relieve their fatigues and soothe their cares*, the influence will have been anticipated, that such a government is no pattern for the United States."[38] (Italics added)

There can be little doubt that Madison believed the U.S. Constitution protected American citizens from *any* government usurpation of a property owners rights. This natural right was deliberately designed to protect the property owner from usurpation of the state or community in name of the "public good" — if that usurpation negatively effects the ability of the citizen to make a living or reduced their long-term plans for the property. The only way property could be taken for the public good is through condemnation and just compensation, or when the use created a common law harm or nuisance.

Property Rights and Environmental Degradation

Environmental degradation of our waterways and air are often cited as evidence that property owners cannot be trusted to protect the environment. Yet, just the opposite is true. It is because our waterways and air are held *in trust* by the state that we have had environmental degradation of those entities. This damage is the direct result of the *law of the commons*, another natural law. People will naturally do things at the least cost and effort to themselves. Since no one "owned" the air and waterways and the state's focus was on development rather than protection, the cheapest way to dispose of waste was to dump it in our rivers and air. Had the states invoked the *common law* principle of harm and nuisance (see below) in the 1960s this type of damage could have been prevented *without* the creation of massive federal agencies like the Environmental Protection Agency!

The law of the commons is not limited to just water and air, however. Management of public lands are often controlled by special interest groups or by unproven theories that can have devastating impacts on the land. The environmental devastation of the communist block nations provides such evidence. But this type of damage is not limited to communist countries. The book *Playing God in Yellowstone, the Destruction of America's First National Park* by Alston Chase provides a clear example of the ecological damage that can result when an ideology of preservation and naturalism dominates public land policy.[39]

In contrast to public land and water, common law has not permitted the same magnitude of damage to private lands. Additionally, those that decry private property rights consistently fail to recognize that it is *always* in the best long-term interests of the landowner to manage their land using acceptable management practices. There are always exceptions to the rule and better ways

of management, but rarely can they be successfully accomplished utilizing the command and control approach typical of feudal/ruler type regulations.

In the final analysis, it is private property rights as constrained by common law and significant harm that is the ultimate answer to environmental protection. A continued reliance on heavy-handed laws and regulations will only serve to devastate landowners and deny them the ability and desire to develop creative solutions to our environmental problems. It will also deny them the incentive to creatively provide the natural resources this nation must have to provide the security and standard of living we all enjoy.

LIMITS OF PROPERTY RIGHTS AND THE PUBLIC GOOD

As important as property rights are to achieving a "perfect" government, the Constitution does impose limits to property rights. There are two natural rights that are superior to property rights; 1) all men are created equal and 2) the use of property cannot harm or create a serious nuisance to another person or his property.

Slavery

One glaring conflict ripped at the very heart of the Founders efforts to make unalienable property rights the foundation of the U.S. Constitution — slavery. Slaves and bond servants under contract were considered a property right by "right of contract" under the British laws. Obviously, this violated the fundamental principles that "all men are created equally" and had unalienable rights to "life, liberty and pursuit of happiness." The right to freely own and use property had to extend to all men if the concept of unalienable rights was to stand as a key part of the Constitution's foundation. In this the Founders were nearly united. Slavery had to be abolished if the constitution were to be applied equitably. Thomas Jefferson, in particular, adamantly opposed slavery and had fought in every public office he held to eliminate it.[40] However, the pathway to an economic transition out of slavery was not so clear, not even for the slaves who were woefully unprepared for freedom.

Contrary to the assertions of some environmental and public interest leaders, most Founders strongly opposed slavery, even those of the deep south.[41] Nonetheless, the economies of Georgia, South and North Carolina were so dependent on slaves that it was unlikely they would ratify the Constitution if it outright prohibited slavery. To provide an orderly transition from slavery, the Founders were willing to allow twenty years for the development of a slave-free economy in these southern states. Article 1, Section 9.1 of the U.S. Constitution prohibits all slave importation and migration after the year 1808, "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight..." The intent of Article 1.9.1

was clearly to abolish slavery. Madison opined,

> "...It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement, and may be totally abolished."[42]

In the meantime the Founders placed a provision in the Northwest Ordinance (passed the same year the Constitution was signed — 1787) that in the new states there would be *no* slavery.[43]

Tragically, in spite of their efforts greed prevailed. The 1808 deadline came and went and slavery still continued. If ever a case were to be made to prove the absolute nature of natural law and unalienable rights, the slavery issue makes that case. Tensions continued to mount for the next 56 years until it helped precipitate the Civil War in 1864. America has payed a terrible price by violating these natural rights.

Today we are once again violating these unalienable rights. By stripping Americans of the right to own and use private property in the "pursuit of happiness," we are creating a new type of slave. This time *all* Americans are becoming slaves to an unaccountable central bureaucracy.

Common Law and Nuisance

Untouchable property rights are called *allodial rights*.[44] Instead we have what is called *fee simple property rights*. Fee simple entitles the owner to the entire property with unconditional power of disposition during his life, or descending to his heirs and legal representatives upon his death. While the title is unconditional, the use of the property can have certain conditions invoked, albeit extremely limited conditions.[a] The Fifth Amendment to Constitution permits the use of eminent domain to take property for the public good as long as the property owner receives just compensation. Common law provisions of nuisance and harm also prevent property owners from using their property to the detriment of others. Even so, the Fifth Amendment severely limits the scope of common law nuisance and harm by saying a citizen cannot be de-

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[a]Fee simple is defined as "a freehold estate [without end]...absolute and unqualified, the highest and most ample estate known to the law" (*Cochran Law Lexicon*). "Absolute fee simple is "an estate limited absolutely to a man and his heirs and assigns forever without limitation or condition" (*Black's Law Dictionary*). The word "fee" is derived from the concepts of feoda, feuds, fiefs during the feudal era and describes the inclusion of certain conditions by the king or lord. The Magna Carta introduced the basic concepts of due process and just compensation to protect personal liberty. These principles provide the evolutionary foundation for American common law which severely limits the power of the sovereign to interfere with the property of an individual holding a fee simple title.

prived of life, liberty, or property, without due process of law.

The historical limits to property rights are based in common law which serves to prevent a definable harm to a neighbor or the larger community. Since common law is merely the application of custom and case law of a definable community or culture, nuisance laws and regulations affecting private property were, until the 1960s, designed *by a local community* to define when the use of property causes harm to another and prevent that use.[a]

Likewise, zoning laws were historically designed by town, city and county fathers to organize the use of property thereby reducing the use of the court system in settling nuisance disputes. This is where it gets sticky. The difference between nuisance and the altruistic wants or desires of neighbors is fuzzy and can lead to arbitrary and capricious zoning plans. In *Lucas v. South Carolina Coastal Council* the Supreme Court noted that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder...." There will never be a clear definition that can separate nuisance and altruistic values. Likewise, zoning regulations can hurt some landowners while helping others. Greed can and has corrupted the process on numerous occasions. Nonetheless, ***the key to successful zoning and land use regulation while minimizing abuses is to 1) use zoning and regulations sparingly and 2) insure those individuals who develop and administer the zoning regulations are elected, or are directly employed by, those that are elected by the people they regulate.*** They are therefore *directly accountable to the citizens that they are regulating*. If the electorate did not agree with the zoning regulations, the rascals responsible can be voted out of office.

To trust unelected officials and regulators with the awesome power of zoning or land use regulation without strong checks and balances and accountability to those under their jurisdiction will ultimately result in tyranny and destroy trust in government. As Jefferson notes, "Every government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositories."[45]

This natural law has been ignored in recent years. In responding to the public interest and environmental lobbies' rhetoric of doom and gloom, the federal government and to a lesser degree the various states, have usurped power of decision making from the local citizens. In turn, the usurpation of state and local authority by the federal government has led to a litany of "unfunded mandates" that often lead to ludicrous policies when implemented by unaccountable federal agents at the local level. The same can occur when state usurps powers more appropriately belonging at the town, city, or county level. These

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[a] In 1962, with the ruling on *Goldblatt v. Hempstead*, the concept of nuisance and harm merged with that of police powers granted to states. Since essentially any action can be justified as being for the public health, safety, or welfare, governing officials have been free to expropriate private property through regulations for the public good. (See Mark Pollot, *Grand Theft and Petit Larceny*, pp 132-133.

regulations do little to protect people or the environment. Simply stated, ***the higher the level of government in which a regulatory law is made, the less accountable its regulatory agencies will be to the people they regulate and the greater the chance for arbitrary application of those regulations.***

Another violation of Constitutional intent are regional commissions and councils. They often have awesome powers to impose draconian zoning regulations, yet are unaccountable to those they regulate since these commissions and councils are usually appointed rather than elected by their constituents.

This doesn't mean that similar laws aren't necessary at the lower governmental levels to avoid true nuisance and harm. Rather, ***the problem occurs when regulations are crafted and enforced by a federal or state bureaucracy whose natural inclination is to accumulate power and grow increasingly unaccountable to the people they regulate.***

Although the state and local governing jurisdictions have an obligation to make laws to protect its citizens from definable and significant nuisance and harm, it is often done at the wrong level of government. We must begin to return power to the people by assisting local communities and jurisdictions through education and other means. This will not be easy, but Congress and state legislatures must take a hard look at this issue today.

The Public Good

Most businesses and property rights advocates have repeatedly stated they do not object to regulations or regulating bodies, merely regulation without representation. Land use regulation by federal and even state agencies that are not accountable to the community being regulated are merely a variant of feudalism under the guise of the "public good."

It is easy for a majority to trample the rights of a minority to achieve, in the majority's estimate, a "public good." So easy is it to fall into this trap that the majority fails to recognize that the doctrine of the "public good" is a two-edged sword that can easily slay their own freedom. The so-called public good is both dynamic and relative, quickly changing with the whims of society. Chief Justice of the Supreme Court Warren Burger emphasized this point in *United Steelworkers v. Weber*, "[B]eware the 'good result,' achieved by judicially unauthorized or *intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means*. For there is always the *danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."*[46] (Italics added) Unless the rights of *every* citizen are protected *at all times*, freedom is an illusion. Today's majority could become tomorrow's minority.

Unfortunately, the majority has shown itself to be more than willing to appropriate a "public value" if the burden of paying for it can be thrust on a powerless minority. That is human nature and another "natural law." In recent

times this human failing has pitted politically powerful urban and suburbanites against rural citizens. When the urban/suburban majority must bear the cost itself, the result can be quite different. Only when the majority is forced to pay compensation for these benefits will they be compelled to prioritize what they really want and how much they are willing to pay for these benefits.

The only difference between a large city and the rural community is the enormous political power of a large city. Rural landowners must "donate" their land for the health and welfare of their urbanite cousins. It is exactly these kinds of edicts that destroy the economy and lives of rural citizens.

Of course such ludicrous mandates could never be imposed on America's larger cities. Or could they? For nearly sixty years the citizens of the Greater Denver area had planned to construct a dam at the confluence of the South and North Forks of the Platte River — less than an hour's drive from the city. They had "owned" the property rights to this desperately needed water for ninety years. After spending $42 million on studies mandated by the National Environmental Policy Act, the project was about to be approved when, under heavy pressure by environmentalists, EPA head William Reilly announced he was reassigning jurisdiction for the permit from the EPA regional administrator for the Denver area to the regional administrator from Atlanta, Georgia. Not surprisingly, the Atlanta administer arbitrarily decided in 1990 Denver did not need the water.[47]

The EPA under William Reilly used the Clean Water Act (Section 404c) in the name of the "public good" to justify the decision even though such action was forbidden by the Act itself, "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act." [48] Constitutional attorney Perry Pendley notes,

> "Reilly's usurpation of power was nothing more than an attempt to use the Clean Water Act to engage in an activity Congress had rejected consistently: land-use planning. This was in clear violation of the Clean Water Act's provision "preserv[ing] and protect[ing]" state primacy over Western water rights."[49]

To use the doctrine of "public good" or "public interest" as the measure of fairness, legitimacy and limits to property rights is to destroy all pretense of freedom and liberty for everyone. Sooner or later everybody becomes the minority.

Ironically, it is exactly the above situation that the Founders of the Constitution of the United States foresaw as the most serious threat to individual liberty. While laying the foundation for the division of powers during the opening days of the original United States Constitutional Convention in the spring of 1787, James Madison asserted,

"In *all* cases where a majority are united by a common interest or passion, the rights of the minority are in danger."[50] [emphasis added] Madison continues, "[A] pure democracy ... can admit of no cure for the mischiefs of [the majority]... and there is nothing to check the inducements to sacrifice the weaker party. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal securities or the right of property; and have in general been as short in their lives as they have been violent in their deaths." [51]

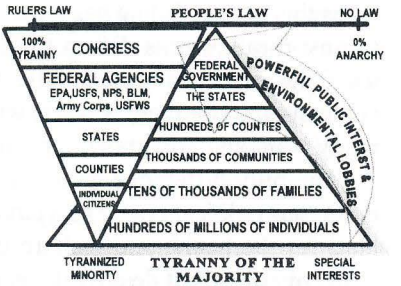

Figure 3. Jefferson framed the Constitution within what he called the People's Law in which the majority of power is with the people, then the counties, states, and finally the least is with the federal government. The very powerful environmental and safety special interest lobbies have begun to reverse this generalized structure back to the feudal/ruler form of government by persuading an uninformed "majority" using exaggerated and often false claims that the "public good" is served in the passage of such laws. They can then apply enormous political pressure on congress and state legislatures to pass laws that usurp local authority. This approach was despised by our Founders who called it the Tyranny of the Majority.

Federal and sometimes state agents are becoming increasingly unaccountable to individual citizens over whom they now have jurisdiction. Such unaccountability inevitably leads to tyranny. As long as the federal government continues to usurp state, local and property rights, the tensions and civil unrest that is growing within the United States will only get worse.

Madison wasn't denying the benefits of a democracy, only the inevitable abuses of an *unconstrained* democracy. A pure democracy is nothing more than mob rule, controlled by whomever exerts the most power over the majority. Madison called it the "Tyranny of the Majority." Justification of actions in the so-called "public interest" or "good" for the majority, at the expense of a minority, will inevitably cause harm to the majority and destroy the stability of that society. Hence, the United States Constitution never intended for public policy to be based on the concept of the public good without severe constraints. Instead, our Constitution is not based on a pure democracy as many believe, but on a democracy *within* a Constitutional Republic constrained by "unalienable rights".

As defined by the U.S. Constitution, a Republic divides power between counties, states and the federal government. Powers held by each of these levels is further divided between the legislative, executive, and judicial branches. The greatest powers of government were to be delegated to the local governments, not the federal or even state levels of government. Jefferson noted that "It was by dividing and subdividing these republics from the great national one down through all its subordinations until it ends in the administration of every man's farm by himself, by placing under every one what his own eye

may superintend, that all will be done for the best."[52]

Changing demographics in America has led to increasing political power in our urban and suburban cities never envisioned by Jefferson. Citizens living in large cities usually are disconnected from the realities of rural life and resource utilization. Yet, their increasing power within congress and the various state legislatures has permitted the environmental and public interest lobbies to employ the tactic of the "tyranny of the majority" for altruistic goals without urban/suburban citizens even knowing it. These special interest lobbies have convinced the urban/suburban majority and congress to create an interlocking web of laws and regulations that usurp local and state jurisdictions and bestow enormous powers on federal bureaucrats who implement regulations, yet have little to no accountability to citizens they govern. This violates the protections intended by the Ninth and Tenth Amendments to the Constitution (see page 7).

Our Founders intended that unalienable rights and the concentration of power at the local level would protect the rights of the minority from the tyranny of the majority.[53] **While imperfect, a democracy can flourish only when unalienable rights are held sacred, the powers of government are divided multiple times, and those administering those powers are *directly* accountable to the citizens they govern at the lowest possible level of jurisdiction.** That level of jurisdiction was never intended to be the federal government. The only practical way that Congress can protect the rural minority is the Constitutional way of **providing full compensation to a landowner when the enforcement of a regulation devalues their land value**. The only exception to compensation must be in those instances where a law or regulation is clearly one based on common law nuisance and harm.

This approach is clearly the direction the Supreme Court is taking in recent decisions (see Supreme Court Case History, page 29). Since the line between nuisance and an altruistic "public good" can never be clearly defined, nuisance and harm must be truly *significant*[a] before a landowner is not entitled to compensation. The concept of significance must be included because rhetoric can elevate a so-called public good to the level of harm and nuisance. A harm or nuisance can only be significant when the bulk of *peer-reviewed empirical*

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[a]As an example, clearcutting to the edge of a stream has the high probability of increasing the temperature and siltation of the stream which has been demonstrated by empirical science to lower a state's property values inherent in the biodiversity of the stream. A regulation requiring a minimum of a 50 to 75 foot buffer zone has been scientifically shown to protect these values in all but a minority of cases and is therefore a defendable regulation requiring no compensation. The same would be true of effluent from a community or city.

Any requirement of a wider buffer zone is based purely on aesthetic values or some unproven theory. Such a requirement in a regulation must therefore be compensated. Likewise, the use of wetlands, or harm as used in the current Endangered Species Act must be at least partially compensated since the single activity by itself would not harm the "overall" health of an ecosystem or the species that may be endangered. The harm that results from wetlands and habitat destruction comes from the cumulative affects of all society and will be discussed later.

scientific evidence demonstrates a clear harm to human health or a lowering of another person's or state's property rights or values through negligence, pollution, or overt act. Whenever there is a doubt, property rights must always prevail.

It took the French two Revolutions to learn these lessons and throw off the bondage of feudalism in France. Alexis de Tocqueville acknowledged in 1848, "The principles on which the American constitutions rest, those principles of order, of the balance of powers, of true liberty, of deep and sincere respect for right, are indispensable to all republics."[54] Indeed, as our Founders asserted, no other form of government can protect the freedom of its citizens.

Federal Land Ownership

Of the growing number of examples of feudalism in America, federal land ownership has created the greatest tyranny and its resulting strife and civil unrest. The use of federal land is not controlled by those who must depend on it for a living or survival, but by an increasingly arrogant federal bureaucracy. Although recent environmental laws normally have provisions to take into account local needs, in practice federal agents respond to the larger wishes of the so-called "majority" of Americans for whom the particular Act was written. It represents the very worst of the "tyranny of the majority" that James Madison warned us to never permit to occur. To avoid this type of tyranny, our Founding Fathers severely limited the ability of the federal government to own land in Article 1, Section 8 of the U.S. Constitution,

> "To establish post offices and post roads;[55] To exercise exclusive Legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places *purchased by the consent of the Legislature of the State* in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."[56] (Italics added)

These are the only authorized types of property to which the federal government can and does hold title and deed. Nowhere in the Constitution does it provide for the federal government to own large blocks of land. Yet, through a series of questionable decisions and agreements over the past 190 years starting with the Ohio Enabling Act of 1802, vast tracts of federally administered land currently exist across America — especially in the West. Ironically, it was Thomas Jefferson himself who started this trend while he was President, so that territorial "waste lands" could be held in Federal trust and sold to pay down the national debt created by the Revolutionary War.[57] Eventually the federal government required territories to yield rights over "public lands" to

federal jurisdiction as a condition of statehood. By doing so, the federal government seemed to avoid the need to obtain "the *consent of the Legislature* of the State in which the same shall be."

Not only does this "condition of statehood" smack of extortion, the whole approach tends to violate the intent behind the "Equal Footing Doctrine" as set forth in the Northwest Ordinance and passed in 1787. The Ordinance was reenacted without change by Congress after the Constitution was ratified,

> "Article IX ...provides also that no state shall be deprived of territory for the benefit of the United States."[58]
>
> "Section 13 ...to provide also for the establishment of states, and permanent government therein, and for their admission to a share in the Federal Councils on an *equal footing with the original states*."
>
> "Article V ...and whenever any of said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on *equal footing with the original states, in all respects whatsoever*..."[59] (Italics added)

Although territories held "in trust" by the U.S. Government are under federal jurisdiction according to Article IV of the U.S. Constitution, once a territory becomes a state under the Equal Footing Doctrine, that state is equal in all respects with the original thirteen states. Since the federal government made no claim on any land within the thirteen (except for the District of Columbia), no claim could be made on any state made from a U.S. territory. This point was made clear in the *Report of the Interdepartmental Committee for the study of Jurisdiction over Federal Areas within the States. Part II @ 46, 47,* "The consent requirement of 1.8.17 was intended by the framers of the Constitution to preserve the State's jurisdictional integrity against federal encroachment. The federal government *cannot*, by unilateral action on its part, acquire legislative jurisdiction over an area within the exterior boundaries of a state."

To make territorial concession a condition of statehood is nothing more than blackmail and extortion and is non-binding. The Supreme Court seems to have agreed in numerous decisions. The Equal Footing Doctrine was upheld in *Pollards Lessee v. Hagen* where the Court affirms the sovereignty of the original thirteen states,

> "When the United States accepted the cession of the territory, they took upon themselves the *trust* to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that was held by the states ceding the territories."[60 a] (Italics added)

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[a]Seven of the original thirteen states had claimed all the land to the Mississippi River. Since land was wealth, many states like Connecticut and Rhode Island were already surrounded by

(continued...)

The fact that a new state is not bound by agreements made while it was a territory was clearly established in *Coyle v. Oklahoma.*[61] Congress had required the Oklahoma Territory to agree to maintain the state capital at the territorial capital of Guthrie as a condition of statehood. The Territory of Oklahoma agreed to this condition, but in 1910 (three years after it became a state) the legislature moved the capital to Oklahoma City. The Supreme Court held that since Congress had no right to determine the location of the capital in any of the original thirteen states, it could therefore not enforce the ordinance mandating the location of Oklahoma's capital when it received statehood.

The Equal Footing Doctrine is also reaffirmed by the Treaty of Guadalupe Hidalgo whereby Mexico ceded to the United States most of the southwest, including California, Nevada, Utah, Arizona and parts of Wyoming, Colorado and New Mexico,

> "...*states shall be formed into free, sovereign, and independent states* and incorporated into the Union of the United States as soon as possible, and the citizens thereof shall be *accorded the enjoyment of all the rights, advantages, and immunities as citizens* of the original states..."[62] "When the original states became free sovereign states, *all* the land within the border of each state was to be either privately owned, or belong to the state."[63] (Italics added)

In spite of the clear intent of this treaty, vast tracts of these same states are now in federal trust with California exceeding 50 percent and Nevada 90 percent! While most people believe the federal government owns these lands, they appear to have no title or deed to the land. The only land the federal government "owns" are those Constitutionally provided for in Article 1, Section 8.7 and 8.17. At best, the vast tracts of federal land held as a condition of statehood and administered by the U.S. Forest Service and Department of Interior are "public lands" ***held in trust for the people of the state in which they are found!*** This distinction was clear in the Organic Act 1897 and the Taylor Grazing Act of 1934. Both recognized certain harvesting, grazing and other property rights of the first users and clearly stated the law was to benefit local citizens and communities as a first priority. Only when local needs were met were the needs of the larger nation to be considered.[64]

The lives of those Americans and their families, indeed entire communities, who depend on public land for their living are systematically being destroyed by federal agents serving the larger public. Federal agents do the same thing to

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[a](...continued)
existing states and could therefore never be equal to those that claimed huge land areas. Those states having land to the Mississippi *voluntarily* ceded much of it to the United States as a trust that could later be made into new states. In order to do this, these states had to have had legal ownership of the land in the first place.

every American in the administration of environmental and safety regulations. Because these federal agents are not accountable to local citizens, they can *and will* become tyrants without realizing it. As discussed on pages 10, 11, 27, ***it is the feudal/ruler system, not the people, that creates the tyranny.*** It was for exactly this reason why our Founding Fathers severely limited the powers and land ownership of the federal government.

DEVELOPMENT AND CUMULATIVE EFFECTS

There remains one stubborn problem, the cumulative effects syndrome that accompanies a healthy, expanding economy. Negative cumulative effects occurs when any one activity or development will not cause a significant impact, but many of them added together could cause a significant harm as defined by common law.

Creating a Healthy Economy

The irony of the escalating controversy over property rights is that land use planning can provide sound benefits for all Americans. Property owners seem to recognize this as they have repeatedly stated they are not against regulation, just the state sponsored tyranny they have suffered.

The primary forms of employment and wealth creation in rural America centers on agriculture, mining, forest products, recreation, marine fisheries, and light industry. All six are compatible with open space concepts and can provide 1) the economic base for a high quality standard of living for local residents, 2) a high quality recreation experience for visitors, and 3) a high quality habitat for wildlife and biodiversity. Yet, the no-chemical, no-use wilderness philosophy that has dominated many environmental organizations is dramatically reducing *all six* of these desirable uses of rural land.

In order to develop a strong stable rural economy, 1) local landowners must be able to apply proven technology to manage and provide natural resources, including food, to all Americans, and 2) local communities must have the freedom to develop the housing, business, and recreation infrastructure needed if they are to draw business and tourists to their communities. Many environmental special interest lobbies decry this approach as damaging to the environment that is not sustainable. The only solution advanced by environmental leadership has been to create unaccountable, appointed feudal/ruler type regional planning commissions to develop and implement regulations that control resource use and community development.

Although problems do exist, many highly controversial issues such as the use of chemicals in agriculture and forest clearcutting are grossly exaggerated in a way that invokes James Madison's "tyranny of the majority" (see pages 21, 23). Research has shown naturally produced chemicals can be just as toxic and carcinogenic as man-made chemicals. Dr. Bruce Ames, who was responsi-

ble for developing the cancer screening tests in such wide use today has found that there are more carcinogens in one cup of coffee (about 600) than in all the man-made chemicals likely to be consumed by an adult in an entire year![65] Conversely, reducing our dietary intake of fruits and vegetables has been conclusively shown to increase cancer by a whopping 200 to 300 percent! The use of chemicals has made fruits and vegetables cheap and readily available. To deny farmers the use of chemicals that are otherwise proven safe on an extremely low probability that there *might* be an increased risk of cancer is not only ludicrous but will actually increase the death rate among the poor as food costs increase beyond their ability to pay for a healthy diet!

Likewise, the majority of recent research has demonstrated that large areas of undisturbed forests maintained by a wilderness philosophy will also dramatically reduce biodiversity and wildlife habitat.[66] Ancient forests are no more healthy than a human society comprised of nothing but retirement communities. Healthy ecosystems require a balance of all age classes and forest habitat conditions to optimize ecosystem health, including only a relatively small amount of old growth. Proper forest management, including the use of clear-cutting can provide that balance. Wilderness can not.

Who Pays?

The question of cumulative effects boils down to who pays for it. The issue is neither a clear case of nuisance and harm where the owner pays, nor is it altruistic in nature where society pays — yet it is real. If treated as nuisance, as does most current law, then at some magic level of development or disturbance the last landowners have to foot the entire bill. Yet their actions have contributed to the problem no more or less than those activities that proceeded them. Although it is often difficult to quantify, typically all citizens in the community, state or nation have benefited from the growth that now threatens the whole. There is only one solution to this problem that maintains the constitutional intent of protecting property. Justice requires that the public at large must compensate, *in part*, the loss of value of property owners who are now restricted in the use of their land due to the actions of others proceeding them. The compensation should come from the agency that promulgated the regulations.

Likewise, the owner should share in this responsibility. The most equitable approach would be for the agency to pay full compensation after the property is devalued by a certain amount — say 33 percent. Partial compensation would force both parties to look for viable alternatives so that neither gets stuck with the full cost. Creative juices would flow and the state would be doing what Madison and other Founders said should be the first responsibility of government — protecting property rights. If no solution can be found, the landowner receives partial compensation. If an alternative solution can be found there would be little to no increase in cost to either party. ***This is the only approach***

that will force the federal and state governments to determine what is really a cumulative damaging activity and force them to prioritize how it will most effectively use its limited resources to protect the environment.

The fear that such an approach would be financially prohibitive has been dispelled by the Congressional Budget Office in a report on the impact of Omnibus Property Rights Act S-605 with proposed a 33 percent takings threshold. Their analysis predicts that "relatively few [claims] would result in payment because ...the requirement that compensation payments be made from agency appropriations would cause the agencies to try to resolve as many claims as possible without having to pay any compensation - for example, by reversing or modifying permit decisions or enforcement actions, by processing permit applications more quickly, and by working more closely with landowners to negotiate permit conditions."[67] Indeed, that is the way it should work!

SUPREME COURT CASE HISTORY

There is little doubt that many laws in America are fatally flawed in a way that has led to loss of unalienable property rights. Contrary to popular belief, however, the flaw is not over land use planning and environmental protection. Nor is it just in the heavy-handed way in which the law has sometimes been administered. Although it certainly would be less painful, tyranny, as defined by James Madison, would prevail even if federal agencies and staff were made up of saints who made every effort to protect property rights.

The flaw in these laws chiefly resides in the structure of the laws themselves. Simply, they tend to create a governing body that has far reaching regulatory and punitive powers that benefit some citizens without meaningful accountability to the citizens over which the law and its regulating agencies have jurisdiction. Although these laws were created for a noble reasons, in reality they impose a neo-feudal form of governance. This flaw must be corrected.

One approach to resolving this neo-feudal inequities of the many environmental and public interest laws is for an aggrieved party with the right test case to spend a million dollars (with the government spending another million plus) and take it to the Supreme Court. Although it is an option, so far no one has had the financial ability to carry a ripe case all the way to the Supreme Court.

There are fundamentally two Constitutional issues involved. The first involves the takings clause of the Fifth Amendment and centers on the draconian regulations limiting what landowners can do on their own land. The second focuses on whether the federal government has a right to invoke a feudal/ruler regulatory structure, and if it does, whether it can apply it against a targeted minority. The fact that these laws involves multifaceted Constitutional issues

could take years to resolve and multimillion dollars of private and taxpayer dollars.

Another problem with the litigation approach is that even if a law is clearly a violation of the *intent* of our Founding Fathers, there is no guarantee that the current Supreme Court would rule in the litigant's favor. Constitutional Law has drifted far from the original intent of our Founding Fathers to the detriment of all Americans. Additionally, the composition of the Court itself can weigh heavily in any decision on this issue.

The Drift Towards a Feudal/Ruler Police State

The universal right of the state to justify increasing intrusive regulations as being in the public health, safety and welfare was first developed in 1837-47 with *Charles River Bridge v. Warren Bridge* and the License Cases of 1847. Chief Justice Taney gave the state police power succinct definition, "The power to *govern men and things* within the limits of its own dominion."[68] Even so, the original reason and intent for property rights in deciding takings cases of the Founding Fathers was only gradually eroded until 1962. With the *Goldblatt v. Hempstead* decision in 1962,[69] the Court boldly moved away from the Founding Fathers original intent by combining the concept of "nuisance" with that of "police power."[70] The concept was solidified in the *Penn Central Transportation Co. v. New York City* decision in 1978. Since then the "courts have deemed themselves free to engage in a balancing inquiry between their view of the intrusion's importance to the public and the burden the regulation places on individuals' property rights."[71]

In regulatory cases, a taking can be found only if the governmental action either "1) fails to substantially advance a legitimate governmental purpose or 2) fails to leave property owners with economically viable use of their property."[72] Of course, such a test invites manipulation of the Court decision by merely attaching the right label to the government's action and then requires the property owner to carry the financial burden of proving the federal or state government wrong.[73] In *San Diego Gas & Electric v. San Diego*, (1981) Supreme Court Justice J. Brennen, not a major champion of property rights, asserted the obvious in his dissenting opinion,

> "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owners' point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the *benefits flowing to the public from preservation of open space through regulation may be equally great as from*

creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property."[74] (Italics added)

The result of the Penn Central decision has been to transfer individual property rights as envisioned by the Founding Fathers to the government and its right to promote the public good. But even Brennen supported the concept that as long as the landowner kept *some* economic value the Court would not consider the regulatory effect a "taking." In using the "all beneficial use" benchmark to determine whether a taking has occurred, Brennen and other Justices deny a larger truth. A partial devaluation is tantamount to legally expropriating a citizen's bank account of all but $1 for some "public good" such as reducing the national debt or condemning all except one acre of a citizen's property for a road. Such a basis for finding a "takings" has led to the interpretation that the landowner has no rights at all.

In *Just v. Marinette County* (1972), the Court declared that the state could prevent the Just's from using their property to build a residence for themselves because the Just's had no right to deprive the public of its 'right' to have the Just's property preserved in the state in which nature had created it. In so holding, in a footnote the court cited (with approval) the motto of the Jackson County Zoning and Sanitation Department: "the land belongs to the people...a little of it to those dead...some to those living...but most of it belongs to those yet to be born."[75]

Such decisions, of course, have nothing to do with either Constitutional intention or Common law limitations imposed by "nuisance" and "harm" criteria. ***They do serve, however, to elevate government rights (in the name of the "public good") above civil rights[76] — a characteristic shared by all police states. Further, whether appointed or elected, those chosen few charged with protecting the rights of "those yet born" find themselves endued with growing feudal/ruler powers. This is a real danger in the recent push to make sustainable development the key determinant in all development decisions.*** Such decisions should put all Americans on notice that no civil right is safe when the Court can wander so far from the reason and intent of our civil rights.

Return to Constitutional Intent

This may be changing. The Court seems to be moving back to a more Constitutional "intent" focus in a series of recent decisions — *Nollan v. California Coastal Commission; First English Evangelical Lutheran Church v. County of Los Angeles; Lucas v. South Carolina Coastal Council; Dollan v. The City of Tigard.*

In the *Nollan* case, the Nollan's had requested a permit to replace a small bungalow on their coastal property with a larger house. As grantor of the permit, the unelected California Coastal Commission assumed it had the power

to impose any condition it chose on the basis that a grant of permit was the grant of a governmental benefit. The Commission therefore argued that it was constitutional for the Commission to stipulate the condition that the Nollan's allow the public an easement to pass *across* their beach.[77] The Nollans, after all, had the freedom to reject the proposed condition.

The premis upon which the California Coastal Commission had based its "grant of governmental benefit" assumption is the logical conclusion of a police state. In this reversion to the feudal/ruler law, the rights of citizens are inferior to the rights of the state. This argument was soundly rejected by the Supreme Court. The Court opined that not only was the condition imposed on Nollan not voluntary, but that it amounted to virtual extortion.[78] In rendering the majority decision, Justice Scalia asserted,

> "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.... We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property'.... Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out-plan of extortion.'"[79]

The *Nollan* decision began to turn the Court back to a basis Constitutional *intent* on several key issues. Property rights constitutional lawyer Mark Pollot observes,

> "First, the Court held that to *build* on one's property was a right that could not remotely be considered a governmental benefit or privilege, although it could be subjected to some reasonable regulation. This holding directly confronted two of the most pernicious doctrines to face property owners: (a) the notion that private property owners, whether of real or other property, were more caretakers of their property than owners and their use of property was, therefore, subject to the unlimited control of the public through its governmental agencies, and (b) the related doctrine that holds that property owners' sole right is to use their property in its natural state. Equally important, the Court held that government could impose no condition at all if it could not have prohibited

the use applied for without causing a taking."[80]

While the Court affirmed "that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'"[81] it also specifically rejected the underlying premise of *Goldblatt* that there exists a general police power exception in which government's action is subjected to virtually meaningless judicial review process. The Court insists there must be a legitimate connection,

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.... It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them cause by construction of the Nollan's' new house."[82]

This interpretation reinforces the decision in *First English Evangelical Lutheran Church v. County of Los Angeles.* In this case the County of Los Angeles invoked a development moratorium that at least temporarily prevented a church camp from rebuilding camp buildings destroyed by a flood. First Church argued that the government must pay if it regulates to the point of causing a taking. The Court agreed,

> "[S]uch consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, 'a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[83]

In making these decisions, the Court has raised the question as to why the Nollan's or any small group of landowners should have to carry the entire burden for remedying a problem to which numerous others have contributed.

In *Lucas v. South Carolina Coastal Council* the Lucas family purchased two lots along an already fully developed section of Atlantic coast for $1 million. They planned to eventually build a family home. Before they began to build, however, the South Carolina Coastal Council enacted the Beachfront

Management Act which imposed a permanent and unvarying prohibition on the construction of any habitable permanent structures along the coast. Lucas claimed a "taking" under the Fifth Amendment, but the South Carolina Supreme Court rejected it on the basis it was bound by the legislature's determination that the prohibition was needed to protect against harm. The Supreme Court agreed with Lucas against the State of South Carolina.

Property rights opponents have discounted the Lucas decision by claiming the case was narrowly defined to only those issues that deprive the owner of all economically viable use. But the decision, in reality, goes far beyond that limitation,

> "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make the 'property interest' against which the loss of value is to be measured. When for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme — and, we think, insupportable — view of the relevant calculus, see *Penn Central Transportation Co. v. New York* [citations omitted], where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.)" [84]

By denying the validity of *Penn Central*, the Court in the *Lucas* decision invited cases that would most likely further expand the protections of land owners. In several other key statements within the majority opinion that directly relates to U.S. and state law, the Court recognized that "nuisance" and "harm" are often arbitrary, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.... Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily on one's evaluation of the worth of competing uses of real estate.... [R]ecitation of a noxious-use rationale cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated."[85]

Pollot notes that the Court makes it clear that "government can eliminate all economically viable use of land only if the prohibited activity was one that was 'always unlawful' under principles of common law nuisance."[86] This does not fit laws based on values and the so-called "public good."

In *Dolan v. City of Tigard* the Clinton administration advocated that the Court require the property owner to show that a land use restriction is "a sub-

terfuge for imposing otherwise unconstitutional conditions...."[87] The Dolan's had sought a permit to double the size of their electrical supply store and pave some 20,000 square feet of their property's 71,000 square foot lot in downtown Tigard, a suburb of Portland, Oregon. To receive a permit the City of Tigard required the Dolans to 1) cede the 10 percent of the property that was within the 100 year flood plain, 2) cede a 15-foot wide piece of their property for a bike path, and 3) then build the 8-foot wide path. The Oregon Supreme Court held this was not a "takings" on the basis the Dolans "may avoid physical occupation of their land by withdrawing their application for a development permit."[88]

In responding to the federal Amicus Curiae, Justice Anthony Scalia emphasized, "[T]hat's an awful burden to put on the...small individual property owner...."[89] Indeed it is. The intent of the Constitution was to put this burden of proof on the state, not the landowner! As importantly, Chief Justice Rehnquist condemned the assertion that property rights were somehow inferior to other rights,

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[90]

And to those that argue that the Takings Clause imposes prohibitive costs on local governments, the Court reaffirmed its earlier finding in *Pennsylvania Coal* that, "A strong public desire to improve the public condition [should not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[91]

Finally, the argument that a takings has not occurred if other viable economic alternatives existed was addressed in *Whitney Benefits, Inc. v. United States*. The Court of Claims rejected the government's argument that no "taking" had occurred in Whitney Benefits' application to mine coal in Wyoming since the company could still graze cattle on the surface.[92] Whitney Benefits was awarded more than $60 million.[93]

Likewise in *Loveladies Harbor, Inc. v. United States,* the owner/developers of a 250 acre vacant parcel in Long Beach Township, Ocean county, New Jersey were denied a permit to develop the last 50 acres because 11.5 of those acres was wetlands. The Court dismissed the government's claim that there were other economic values such as hunting, agriculture, a mitigation site, or even a marina,

> "The value of the property virtually has been eradicated as a result of government action.... As a result of government action, there is no market; the only potential buyer is a governmental unit, and the only re-

maining value is a nominal one.... To fulfill the mandate of the Fifth Amendment, the court awards plaintiff the amount of $2,658,000 plus interest from the date of taking...."[94]

Perry Pendley, a Constitutional lawyer sums up the gains made in the Supreme Court by noting,

"For the past twenty and more years, environmental extremists have used the courts of the land — particularly in the West — to clutch courtroom victories from the jaws of congressional defeat, to expand statutes and regulations beyond recognition, and to apply laws in seemingly impossible situations. In the process, property rights have been spurned and the efforts of landowners to seek constitutional redress have been thwarted. More recently, courts, in particular the Supreme Court and the Court of Claims, have read the Fifth Amendment as our Founding Fathers intended and our liberty demands.... The Supreme Court has taken important steps in the right direction, but those steps have occurred relatively recently in a journey that began back in 1922. Much remains to be done."[95]

Supreme Court decisions still leave many questions regarding state powers to regulate when property values are lost. Nor do they address the issue of landowners being denied the freedom, as James Madison so eloquently posited, "to relieve their fatigues and sooth their cares."[96] This latter issue may be the most important in the long-term.

The growing use of non-elected regional comprehensive planning and the usurpation of local rights by the federal government is rampant in the federal expansion of regulations and unfunded mandates. It is troubling, but not surprising, that the same strife that has characterized the property rights debate is already happening at the state level across America! Indeed, the benefits obtained by citizens of some Americas at the expense of others portends their own loss of freedom as America reverts back to the feudal/ruler system of governance abhorred by our Founding Fathers. Just as the federal government has usurped state rights in regulatory actions, federal rights, in turn, are being usurped by treaties like the Convention on Biological Diversity — whose United Nations Global Biodiversity Assessment argues for the need for redistributing most property rights to the UN Global Environmental Facility.[97]

In any event, the Supreme Court remedy is fraught with pitfalls and uncertainties and could be a double edged sword for all parties. We need a strong federal government to provide for healthy commerce and national defense. At the same time we must return the powers usurped by the federal government to the states and local governments. Most importantly we must protect all civil rights as enumerated in the Bill of Rights and other amendments — not just

those that are politically correct or expedient.

A more assured way to achieve this balance is for Congress to take it upon itself to review and correct existing laws to conform to the intent of the Founding Fathers and the freedoms our U.S. Constitution is supposed to provide all citizens. The numerous suggestions that many landowners have been hurt by neo-feudal laws should be taken seriously by congress. In doing so, Jefferson also offers hope that correction can be made peaceably if the principles of the Constitution outlined earlier guide the process,

> "Even [should] representative organs...become corrupt and perverted, the *division into wards*, constituting the people...a regularly organized power, enables them by that organization to crush, regularly and *peaceably*, the usurpations of their unfaithful agents, and *rescues them from the dreadful necessity of doing it insurrectionally*."[98] (Italics added)

We are fortunate the Constitution still exists and offers the structure for a peaceful solution.

SUMMARY OF A NEW FEUDALISM IN AMERICA

In the many supporting documents used to frame and write both the Declaration of Independence and the U.S. Constitution, our Founding Fathers repeatedly asserted that liberty is governed by natural laws and that mankind is endowed with certain unalienable rights from our creator. Among these are "life, liberty, and the pursuit of happiness." Key to these unalienable rights and freedom is property rights. Our Founders warned that without the God given right to own and use land unencumbered by government interference, America would began to revert back to the evil *feudal/ruler* form of governance from which America had just fought a revolutionary war to gain her freedom. In this form of government all power is held by the highest levels of government with the people having the least power and freedom. The rights of the government are superior to the rights of its citizens.

The foundation of this evil form of government is land control; he who controls the land (and water) controls the people. If a person cannot own unencumbered land to grow crops, conduct business, or build a home to shelter their family, they are at the mercy of those who do control the land. Tyranny is the inevitable result. All other freedoms in our Bill of Rights depends on property rights constrained only by the common law concepts of nuisance and harm.

Thomas Jefferson and our Founders established our U.S. Constitution around what he called the *People's Law*. Power within the People's law is held by the local people and their unalienable right to own and use property. That power is *conditionally apportioned* to various levels of government, first to

local government, then to state government, and finally to the federal government. The federal government has the least power of all. Within each level of government all government agents were to be directly accountable to the people over which they had jurisdiction. Once the power reverts back to the federal level, the government will become, as Jefferson warned, "as venal and oppressive as the one from which we have just separated."

The cause of this shift to tyranny has been the incorrect assumption in recent years that property owners, communities and states will not voluntarily protect the environment and public values. Consequently, prevailing wisdom held that laws and regulations had to be developed to force them to do what is right. Ironically, the common law nuisance and harm limitations to property rights has historically prevented serious harm to private land. It is the public domain (water, air and land) that has suffered the most environmental damage due to the "law of the commons." No one "owned" our waters and air, so no one was responsible. Had states used the nuisance and harm provisions of common law to prevent air and water pollution, the avalanche of federal law and the creation of the much maligned EPA would not have been necessary.

Unalienable rights limit the power of the state to use private property for the public good without "just compensation." In turn, common law nuisance and harm provisions limit the rights of a property owner to harm their neighbor. Therefore, if an activity or use of property clearly causes harm to a neighbor by causing harm to the environment, the property owner must pay the cost of mitigation or restoration. These activities can be established in regulatory statutes where the regulators are accountable to those within their jurisdiction. However, if a regulation benefits the larger (i.e. a "public good) without a clear and definable harm, any reduction of property value must be compensated according to the Fifth Amendment of the U.S. Constitution. Finally, if an activity or use does not cause a definable harm by itself, but does when added to all similar activities or uses preceding it, both the property owner and society should share the cost of diminished property value. Society must bear responsibility because it contributed to the problem as much as the proposed activities or use of the current property owner. Partial compensation according to the Fifth Amendment should be required.

Tragically the warnings of Madison, Jefferson, Hamilton and other Founders have gone unheeded in congress and some state legislatures. The overly ambitious and incredibly powerful environmental and public interest lobbies have brought influence and pressure against Congress and State Legislatures to provide agencies with far ranging powers that isolated them from any accountability to the community they regulate. The cost of providing for the "public good" falls disproportionately on a few property owners who often have their life savings tied up in their land. Additionally, by creating these overarching laws and giving agencies incredible authority, powers historically belonging to state, towns and counties have been usurped by the federal gov-

ernment. Even for those laws that are supposedly equitable in their application, the laws and regulations are often so vague that the regulators have awesome powers to apply the regulations *selectively,* and can be used to intimidate, harass, fine and even imprison specific individuals who do not agree with the regulator. Such laws are common among the police states of the world. Many of the federal laws passed since the 1970s allow federal agencies to bypass any accountability to the citizens over whom the agency has jurisdiction. A neo-feudal structure is being established which has had predictable repercussions.

Every one of the fundamental truths of freedom exalted by our Founding Fathers are violated in the present structure of many federal laws and regulations. A growing tyranny and civil unrest is the result. Contrary to prevailing wisdom, the growing controversies and civil unrest are fundamentally not about safety, environmental protection, zoning, planning or how much development. All of these can be important and beneficial if done within the original Constitutional framework envisioned and provided by our Founding Fathers. Rather, the growing tensions are the result of the abolishment of property rights and a government "of the people, for the people, and by the people."

We often forget the true dimensions of Jefferson's words when quoting the first few lines of the Declaration of Independence, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, *Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.*"

We have a clear choice before us. We can choose freedom or feudalism. Congress must begin the process to reverse this evil trend. Failure to do so will result in increasing tyranny, civil unrest and the destruction of over 200 years of freedom — taking with it the light and hope of the world provided by the greatest nation on earth.

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32. John Adams. *Works.* C. Francis Adams, ed. (Little & Brown, Boston, 1850-1856). 1854. Vol. 14:560.
33. Ibid, 15:278.
34. W. Cleon Skousen, The Making of America,. Pp 46-51. See chapters 18 of Exodus and 25 of Leviticus for an account of this story.

35. W. Cleon Skousen, *The Making of America*, Pp 47-61.
36. W. Cleon Skousen, *The Making of America*, Pp 33.
37. *4 Letters and Other Writings of James Madison*, 174. Taken from the essay "Property" written in 1792 and published in the *National Gazette*, March 27, 1792. See also *The Papers of James Madison* 266 (Riland, ed, 1977) and Mark Pollot, *Grand Theft and Petit Larceny, Property Rights in America.* (Pacific Research Institute for Public Policy, San Francisco). 1993. Pp 99.
38. Ibid, 175.
39. Alston Chase. *Playing God in Yellowstone, the Destruction of America's First National Park.* (Harcourt Brace Jovanovich, New York, San Diego). 464 pages.
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50. James Madison, *Notes of debates of the Federal Constitution.* (Bicentennial Edition), 1987. At 76.
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59. Judge Clel Georgetta, *Golden Fleece in Nevada.* Pp 152, 153. In reference to the specific Articles and Sections of the 1787 Northwest Ordinance.
60. *Pollards Lessee v. Hagen* 44 U.S. 212 (1845)
61. *Coyle v. Smith, also known as Coyle v. Oklahoma*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Edl 853 (1911).
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63. Ibid, *@150.*
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65. Dr. Bruce Ames, University of California, Berkeley (retired), see *Science* 258:261-265.
66. Mike Coffman, *The Philosophy, Politics and Science of Biological Diversity.* (Bangor, ME, Environmental Perspectives, Inc.), pp 25-29.
67. Congressional Budget Office Cost Estimate on S-605 and Letter to Senate Judiciary Committee, Senator Orrin G. Hatch, Chairman, Oct. 17, 1995.
68. Alpheus Thomas Mason and Donald Grier Stephenson, Jr. *American Constitutional Law.* 10th Edition. (Prentice Hall, Englewood Cliffs, NJ). 1993. Pp 270. Also *Bridge v Bridge*, 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837).
69. 369 U.S. 590 (1962)
70. Mark Pollot. *Grand Theft and Petit Larceny; Property Rights in America.* (San Francisco, Pacific Research Institute for Public Policy). 1993. Pp 87-90 and 132-133.

71. Ibid, pp 88.
72. Ibid.
73. Ibid
74. *San Diego Gas & Electric v. San Diego*, 450 U.S., 621, 652-658 (1981)(Brennen, J. Dissenting.
75. Mark Pollot. *Grand Theft and Petit Larceny*, pp 64; *Just v. Marinette County*, 201 N.W.2d 761 (1972).
76. Property rights is a civil right, as are all other rights in the Bill of Rights. See *Azul-Pacifico-Inc. v City of Los Angeles*, U.S. Court of Appeals, Ninth Circuit Court, July 23, 1992, 90-55853.
77. Alpheus Thomas Mason and Donald Grier Stephenson, Jr. *American Constitutional Law*. 10th Edition, Pp 316.
78. *Nollan*, 483 U.S. at 837, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).
79. *Nollan*, 483 U.S. at 825.
80. Mark Pollot, *Grand Theft and Petit Larceny, Property Rights in America*, pp 145.
81. *Nollan*, 483 U.S. at 825.
82. *Nollan*, 483 U.S. at 825.
83. *First English, supra*, 482 U.S. at 312, 1987, citing *Mahon.*
84. *Lucas, supra*, 112 S.Ct. at 2894 n.7, 1992.
85. Ibid, 112 S.Ct. at 2998 and 2899.
86. Mark Pollot, *Grand Theft and Petit Larceny, Property Rights in America*, pp 193.
87. *Dolan v. City of Tigard*, Brief for the United States as Amicus Curiae Supporting Respondent, U.S. Supreme Court, October 1993, No. 93-518.
88. Petitioner's App. A-11 n.8.
89. *Dolan v. City of Tigard*, 93-518, Official Transcript proceedings before the Supreme Court of the United States, March 23, 1994, p. 50.
90. *Dolan v. City of Tigard*, 512 U.S., 129 L.Ed. 2d 304, 305, 114 S. Ct. 321 (1994).
91. Ibid, at 323; quoting *Pennsylvania Coal*, op. Cit. 260 U.S. at 416.
92. *Whitney Benefits v. United states*, 752 F.2d 1554 (Fed. Cir. 1985), 18 Cl. Ct. 394 (Cl.Ct. 1989), 926 F.2d 1169 (Fed Cir. 1991).
93. Ibid, 926 F.2d 1169, at 1178.
94. Loveladies Harbor, Inc., v. United States, 21 Cl.Ct. 160-161. (1990).
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96. *4 Letters and Other Writings of James Madison*, 174. Taken from the essay "Property" written in 1792 and published in the *National Gazette*, March 27, 1792. See also *The Papers of James Madison* 266 (Riland, ed, 1977) and Mark Pollot, *Grand Theft and Petit Larceny, Property Rights in America.* (Pacific Research Institute for Public Policy, San Francisco). 1993. Pp 175.
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ABOUT THE PAMPHLET

The increasing tensions and unrest we are witnessing in America are not due to "hate-filled speech" against the government as is popularly proclaimed today, but to a growing tyranny resulting from a government that is no longer accountable to the individual people it governs. Unfunded mandates, expropriation of private property because of wetlands or endangered species, punitive public interest laws, the locking up of western federal lands, and others are not only unnecessarily costing this nation up to $1.6 *trillion* annually, but are tyrannizing Americans. Fifty-two percent of our American citizens now say they are afraid of our federal government. While the strife and unrest *appear* to be the result of our nation's increasing complexity and need to protect the environment, they are, in fact, the result of the violation of the protections our Founders built into the U.S. Constitution.

Whether by design or ignorance, the very powerful environmental and public interests lobbies have begun to reverse our Founder's intent for the Constitution back to a feudal/ruler structure from which they had fought the Revolutionary War to gain freedom. Such a top-down form of governance, our Founders claimed, *always* produces tyranny. Using the Founder's own words, this pamphlet details why the protections intended within the U.S. Constitution are as important today as they were when this incredible document written. It reviews Supreme Court decisions that lead to the problems we have today, and the recent gradual return by the Court to the original intent of our Founders. Finally, it lays out an approach that will keep liberty alive as well as protect our environment.

If the trend back to a feudal/ruler government is not reversed, America is in much greater danger of rolling back over 200 years of freedom than it is in rolling back 25 years of environmental protection. We clearly are choosing between freedom or feudalism.

ABOUT THE AUTHOR

Dr. Michael S. Coffman received his B.S. in Forestry and M.S. in Biology at Northern Arizona University at Flagstaff, and his Ph.D. in Forest Science at the University of Idaho at Moscow in 1966, 1967, and 1970 respectively. Since then he has become a respected scientist and ecologist who has been involved in ecosystem research for over twenty years in both academia and industry. During his long career, Dr Coffman became intimately involved in such national and international issues as acid rain, global climate change, wetlands, cumulative effects and biological diversity.

Dr. Coffman is currently President of Environmental Perspectives, Inc., where he provides professional guidance and training in defining environmental problems and conflicts so that appropriate solutions can be developed within the framework of the U.S. Constitution. He played a key role in stopping the ratification of the United Nations Biodiversity Treaty in the U.S. Senate by revealing the unbelievable agenda behind the treaty and the role of Non Governmental Organizations (environmental groups) in advancing this agenda. His latest book, *Saviors of the Earth? The Politics and Religion of Environmentalism*, exposes the incredible environmentalist agenda.